

COMPLIANCE BOARD OPINION 92-1

October 15, 1992

Mr. Conrad P. Potemra

The Open Meetings Compliance Board has considered three complaints that you have filed regarding the meeting practices of the Town Commissioners of Poolesville. The Compliance Board has consolidated these complaints and will treat all of them in this opinion.¹

I

July 20, 1992 Meeting of Town Commissioners

Your complaint about the meeting of the Town Commissioners on July 20, 1992, was as follows:

At the end of [the open] meeting they went into Executive Session to talk to legal counsel about the ethics exemption. During the regular part of the meeting they openly discussed going into "Executive Session" to discuss the ethics exemption.

It seems to me that this action is a deliberate attempt to circumvent the "Open Meetings" law.

The overall issue before the Town Commissioners was the prospect that Poolesville would no longer be exempt from a requirement that it enact an ethics law. As your complaint letter and the response of the Town Commissioners indicate, this issue was first discussed in open session, as it should have been.

¹ This opinion is issued more than 30 days after the receipt of the response of the town of the first two of your complaints. The Compliance Board was unable to meet the time period specified in §10-502.5(d)(2) of the Open Meetings Act because it attempted, unsuccessfully, to arrange for an informal conference to discuss the complaints prior to the issuance of its opinion. Through its attorney, the town indicated that it did not wish to participate in an informal conference at this time.

The Town Commissioners assert that "[t]he only reason that the commissioners went into Executive Session on the ethics issue was to seek the advice of the Town Attorney concerning specific individual disclosures of property holdings, income, obligations and investments and those of their family members." The minutes of the executive session provided by the town, however, suggest that the discussion was somewhat broader. The commissioners "[m]et with the Town Attorney for advice concerning":

All aspects of the Ethics Law and what alternatives were available to the Commissioners. Also discussed were specific questions concerning disclosures of property holdings, income, obligations and investments and what disclosures were applicable to the family members. It was consensus of those in attendance to discuss the alternatives at the next open session when all of the Commissioners are present.

Under §10-508(a)(7) of the Act, a public body may meet in closed session to "consult with counsel to obtain legal advice." As the Attorney General points out in his Open Meetings Act Manual, "§10-508(a)(7) contemplates that the issue is one on which the advice of the lawyer is sought and given. Once the legal advice is obtained, the public body may not remain in closed session." Manual at 22.

In the opinion of the Compliance Board, the Town Commissioners properly invoked §10-508(a)(7) to the extent that they sought legal advice about the impact of an ethics law on their individual financial situations. However, the Board notes the disclosure in the minutes that the meeting was closed to obtain advice from the town attorney on "all aspects of the ethics law and what alternatives were available to the Commissioners." Neither the minutes nor the town's response to the complaint indicate clearly whether the discussion was properly confined to the obtaining of legal advice or whether the discussion strayed into the expressions of the points of view of the individual commissioners on the underlying policy issues. The minutes do reflect a recognition that such a discussion of "alternatives" needed to be done in open session. On the information available to it, and on the assumption that the Town Commissioners' consultation with the Town Attorney was properly limited to the obtaining of legal advice, the Compliance Board concludes that no violation of the Open Meetings Act occurred by the closing of this session.

The town's response to your complaint about the July 20 meeting pointed out that, in the same executive session, the Town Commissioners discussed the job description of the Town Manager. The town concedes that this matter was not referred to in the statement made prior to the closed session as required by §10-508(d)(2)(ii). Accordingly, the Compliance Board finds that the Town Commissioners violated the Open Meetings Act in that respect.

II

August 3, 1992 Meeting of Town Commissioners

Your complaint about the meeting of the Town Commissioners on August 3, 1992 was as follows:

At the end of [the open] meeting they went into Executive Session to talk to legal counsel. After the regular meeting both Scott Recinos, a member of the Town Engineering Firm of Kamber Engineering and an un-named gentleman stayed for the Executive Session. To the best of my knowledge, Scott Recinos does NOT have a Law Degree, but a Civil Engineering degree.

It seems to me that this action is a deliberate attempt to circumvent the "Open Meetings" law.

In their response, the Town Commissioners state as follows:

The Commissioners adjourned to a closed session to seek legal advice concerning the foreclosure notice on Elizabeth's Delight, a subdivision in Poolesville, which was published in the Montgomery County Sentinel. The commissioners invited Mr. Robert Jacoby, an officer of the Providence Savings and Loan Association with whom the Town holds several Letters of Credit, to the meeting to determine the plans of the Bank. Mr. Scott Recinos, the Town Engineer, was invited to sit in the meeting to discuss the remaining infrastructure and easements that needed to be accomplished. The meeting was adjourned following this discussion.

The motion to close the session was predicated solely on the §10-508(a)(7), which authorizes a closed session to "consult with counsel to obtain legal advice." While the portion of the closed session concerning advice about the foreclosure notice was within the cited exception, the invocation of this exception did not permit the discussion in closed session with Mr. Jacoby or Mr. Recinos. A public body may not have a discussion in closed session beyond the limits of the applicable exception.

Accordingly, the Open Meetings Compliance Board finds that the Town Commissioners violated the Open Meetings Act by conducting a closed session on August 3 without proper authority.²

III

August 17, 1992 Meeting of Town Commissioners

Your complaint about the meeting of the Town Commissioners on August 17, 1992 was as follows:

At the end of [the open] meeting they went Executive Session to discuss a personnel matter. After the regular meeting Scott Recinos, a member of the Town Engineering firm of Kamber Engineering stayed for the Executive Session. To the best of my knowledge, Scott Recinos is NOT a direct employee of the town, he is a contractor.

It seems to me that this action is a deliberate attempt to circumvent the "Open Meetings" law.

In a subsequent letter, you clarified your concern that the presence of Mr. Recinos in the meeting suggested that the "personnel" exception had not been properly invoked.

In their response, the Town Commissioners report that the closed session on August 17 was predicated on two exceptions: §10-508(a)(1)(ii), which authorizes a closed session to discuss a "personnel matter that affects one or more specific individuals"; and §10-508(a)(7), which authorizes a closed session "to consult with counsel to obtain legal advice."

The minutes of the closed session reflect that the "specific personnel" exception was invoked for a discussion with the Town Manager of "his job description and placing him on permanent status." The town's response indicates that Mr. Recinos was in fact not present during this portion of the closed session. The Open Meetings Compliance Board finds no violation of the Open Meetings Act with respect to this portion of the closed session on August 17, 1992.

The minutes further reflect that the "legal advice" exception was invoked for consultation with the Town Attorney regarding:

² The Town Commissioners do not assert that the discussion in question involved an "executive function" as defined in §10-502(d).

(a) Legal ramifications of accepting a bid offer on Phase III Construction of the Waste Water Treatment Plant and immediately providing change orders that would delete a portion of the project. [and]

(b) The draft Poolesville Ethics Law which the Commissioners had asked him to prepare, and how the draft law would affect the individual Commissioners.

As this opinion has indicated previously, §10-508(a)(7) is to be narrowly construed to cover only the interchange between the client public body and its lawyer in which the client seeks advice and the lawyer provides it. The Compliance Board is of the view that the Town Commissioners' consultation with the Town Attorney regarding the bid process concerning the waste water treatment plant was within the narrow scope of the exception. Nor are the commissioners precluded by the Open Meetings Act from inviting the Town Engineer to stay during this consultation with the Town Attorney. The Compliance Board recognizes that legal issues often cannot be addressed without a clear understanding of the facts, and a technical expert can help both the public body and its lawyer understand the issues.

Accordingly, if the role of the Town Engineer during the closed session was limited to assisting the commissioners in framing their request for advice to the Town Attorney or assisting the Town Attorney to understand the issue in order to render legal advice, the Open Meetings Compliance Board finds no violation of the Open Meetings Act.

Likewise, as indicated in Part I of this opinion, §10-508(a)(7) was properly invoked to obtain legal advice about the impact on the commissioners of a draft ethics law. If the discussion was confined to that legal advice and did not stray into a policy discussion about the pros and cons of the law, no violation of the Open Meetings Act took place.

OPEN MEETINGS COMPLIANCE BOARD

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